1993

Pipe Specialty, Inc. v. Industrial Commission of the State of Utah, Salvador Montoya : Brief of Petitioner

Utah Court of Appeals

Sharon J. Eblen; Attorney for Industrial Commission of Utah; Salvador D. Montoya; Pro Se.
James J. Lund; Attorney for Petitioner.

IN THE UTAH COURT OF APPEALS

930353

PIPE SPECIALTY, INC., a Utah Corporation,	:	
Petitioner,	:	COURT OF APPEALS
-vs.-	:	Case No. 930353-CA
INDUSTRIAL COMMISSION OF THE STATE OF UTAH and SALVADOR MONTOYA,	:	Priority No. 7
Respondents	:	

BRIEF OF PETITIONER

APPEAL TAKEN FROM A DECISION OF THE
INDUSTRIAL COMMISSION
STATE OF UTAH

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PRO SE

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JURISDICTION AND NATURE OF PROCEEDINGS

The Utah Court of Appeals has jurisdiction in this matter pursuant to Article VIII, section 3 of the Utah Constitution, and Utah Code Ann. 35-1-1 *et seq.* and 63-46b-1 *et seq.* Peitioner seeks relief from a Default Judgment entered against it on March 20, 1992. This is an appeal from a final order of the Industrial Commission of the State of Utah issued by Administrative Law Judge, Donald L. George, on the 19th day of October, 1992. Subsequently, Petitioner timely filed its Motion for Review with the Industrial Commission. An Order denying Petitioner's Motion for Review was entered on the 6th day of January, 1993, by the Industrial Commission. Neither Petitioner nor its counsel, the undersigned, received notification of the Commission's Order denying Petitioner's Motion for Review. Therefore, Petitioner filed a Motion for Reconsideration on the 8th day of April, 1993. Such Motion for Reconsideration was not acted upon in a timely manner by the Commission and, therefore, was deemed denied. On the 2nd day of June, 1993, Petitioner filed a Writ of Review with the Utah Court of Appeals.

ISSUES PRESENTED FOR REVIEW

I. Do the actions of Petitioner, giving rise to the entry of Default Judgment against it, constitute excusable neglect, mistake and in part because of misrepresentation by Applicant, such that equity requires the Default Judgment be set aside?

II. Was there sufficient evidence before the Industrial Commission in order to arrive at its Findings of Fact and Conclusions of Law? Was the award granted by the Industrial Commission reasonable based on the evidence before it?

STATEMENT OF THE CASE

A. Nature of Proceeding. This is an appeal from the decision of the Industrial Commission rendered by Administrative Law Judge, Donald L. George, on October 19, 1992, (Case No. 91-1181) wherein Findings of Fact and Conclusions of Law were entered. Previsouly a Default Judgment had been entered against the Petitioner, Pipe Specialty, Inc., on or about March 20, 1992. Subsequent Findings of Fact and Conclusions of Law found that the Applicant, Salvador D. Montoya, was injured while working for Petitioner. The medical bills for the treatment rendered to Applicant included $432.25 to the Bannock Regional Medical Center in Pocatello, Idaho, and $503.00 to Dr. Davis, a physician in Las Cruces, New Mexico. Further, it was determined that the Applicant was working an average of 55 hours per week and earning in excess of $11 per hour, being married and supporting a dependant child. Further, the Applicant was deemed temporarily totally disabled from the date of the accident, October 2, 1991, through and including January 3, 1992. Therefore, Applicant was awarded $5,706.01 for the temporary total disability. Further, Petitioner was ordered to pay the attorney's fees of the Uninsured Employers Fund for an additional amount of $520.00. Such judgment amounts include interest at 8 percent per annum beginning January 3, 1992.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Utah Code Annotated, (1953 as amended) Section 35-1-1 *et seq.*

Utah Code Annotated, (1953 as amended) Section 63-46(b)-1 *et seq.*

Utah Rules of Civil Procedure, Rule 60(b).

Article VIII, Section 3 of the Utah Constitution.

STATEMENT OF FACTS

On or about October 1, 1991, while in the employ of Pipe Specialty, Inc., Applicant, Salvador D. Montoya, allegedly suffered an industrial accident wherein a small bone in the great left toe was fractured. The accident occurred at the work site of Petitioner, Pipe Specialty, at or near Pocatello, Idaho. The Applicant incurred emergency medical expenses in the amount of $432.25 from the care provided at the Bannock Regional Medical Center at or near Pocatello, Idaho. Subsequently, Applicant incurred medical expenses from a physician in Las Cruces, New Mexico, of $503.00. The alleged accident of the Applicant occurred as the Petitioner was completing its job in the Pocatello, Idaho, area. Subsequently, Petitioner's work was sporadic throughout the remainder of 1991 and 1992. Though Applicant was temporarily disabled because of the accident, Petitioner was unable to employ him or other employees during the entire period of Applicant's temporary disablement.

Shortly after the accident, on or about October 22, Applicant filed a Petition for Hearing seeking workers compensation benefits to be paid by Petitioner. Sometime in 1992, it was communicated to Petitioner by the Applicant that Applicant no longer wished to pursue any claim against Petitioner for workers compensation benefits. In the first part of 1992, Petitioner

continued to employ the Applicant in its various work projects throughout Utah and New Mexico.

Because of the numerous representations made by Applicant to Petitioner, Petit ıer did not respond to Applicant's Application and did not advise counsel of any pending ad· .istrative action. On or about March 20, 1992, unbeknownst to Petitioner a Default was er ·ed against Petitioner for failing to timely respond to the Application of the Applicant for workers compensation benefits. Plaintiff did not receive any Notice of such Default. The subsequent Notice that Petitioner received from the Industrial Commission was that of a Notice of Cancellation of the Hearing sought by Applicant. Such Notice of Cancellation was dated April 2, 1992.

Other than the initial Application for workers compensation benefits, Petitioner, Pipe Specialty, never received any Notice or communication from the Industrial Commission. Concurrently, Petitioner was involved in another matter pending before the Industrial Commission and was represented by counsel. After Petitioner's Default was entered, a hearing was held (on October 15, 1992) wherein the merits of the Applicant's claims were considered. The Industrial Commission, based on Findings of Fact and Conclusions of Law entered into by Administrative Law Judge Donald L. George, ordered that Petitioner, Pipe Specialty, pay to the Applicant any and all medical expenses, in excess of $935.00, together with unpaid temporary total compensation in the amount of $5,706, together with interest accruing at a rate of 8 percent per annum. Thereafter, the award entered against Petitioner was augmented in an amount of $520.00 for attorney's fees incurred by the Uninsured Employers Fund, having appeared through its counsel, Thomas C. Sturdy.

SUMMARY OF ARGUMENT

Petitioner, Pipe Specialty, Inc., should be entitled to the equitable relief of having the Default Judgment against it set aside. Petitioner was led to believe by the Applicant that the Application for workers compensation benefits for the accident that occurred on or about October 1, 1991, was no longer being pursued by Applicant. Though Petitioner did receive the initial Application for such benefits, it received no other additional notices or communication from the Industrial Commission concerning any pending action, including hearings regarding the merits of Applicant's claims.

Further, Petitioner's neglect is further excused and its arguments for equitable relief strengthened by its receipt of a Notice of Cancellation of Hearing from the Commission. Because the Applicant misled Petitioner into believing that the Application for workers compensation benefits was withdrawn, he caused the Petitioner to be taken off notice of any pending administrative action. Further, Petition continued to employ Applicant through and including the first part of 1992 in the location of Applicant's home town, Las Cruces, New Mexico.

Notwithstanding the valid arguments by Petitioner in seeking a review on the merits, the Industrial Commission conducted a hearing via telephone wherein it arrived at the Findings of Fact and Conclusions of Law which were not supported by a sufficient factual record. Specifically, the Commission relied on hearsay testimony as to the number of hours worked on the average by Applicant (being in excess of 55 hours per week). Such finding constituted the majority of the judgment award against Petitioner.

ARGUMENT

STANDARDS OF REVIEW

Factual Determinations Must Be Supported by the Evidence

As with Reviews of other Administrative Agencies, this court gives deference to facts determined by the Agency at the hearing level if they are supported by the evidence. Where they are not supported, no such deference is given. In Hurst v. Board of Review of the Industrial Commission, 723 P.2d 416, 419 (Utah 1986), the Utah Supreme Court described this deference. "On questions of fact, the Commission's Findings are conclusive and not subject to review by this court unless they are without substantial support in the record and thus clearly arbitrary and capricious." The Findings of the Agency are reviewed under a clearly erroneous standard. "The Findings are clearly erroneous only if they are against the clear weight of the evidence, or if the Appellat Court otherwise reaches a definite and firm conviction that a mistake has been made." State v. Walker, 743 P.2d 191, 193 (Utah 1987). Further, the Findings of Fact must be supported by substantial evidence when viewed in light of the whole record before the court. See Grace Drilling Company v. Board of Review of the Industrial Commission of Utah, 776 P.2d 63, 67 (Utah 1989).

POINT I

BECAUSE OF EXCUSABLE NEGLECT AND MISREPRESENTATION, EQUITY JUSTIFIES PETITIONER'S CLAIM FOR RELIEF FROM THE DEFAULT JUDGMENT ENTERED AGAINST IT.

Rule 60(b) of the Utah Rules of Civil Procedure authorizes the court to relieve a party from a judgment for reasons including but not limited to: "(1) mistake, inadvertence, surprise or excusable neglect; ... (3) fraud, whether heretofore denominated, intrinsic or extrinsic, misrepresentation or other misconduct of an adverse party; ... or (7) any other reason justifying relief from the operation of the judgment." Rule 60(b), Utah Rules of Civil Procedure.

As is apparent from the above facts and substantiated by the Affidavit of Petitioner's President, Mr. Ron Bingham, Petitioner's actions rise to the level of excusable neglect and that Petitioner has been a victim of misrepresentation by Applicant.

The position of the Utah Supreme Court on Rule 60(b) motions is clearly anti-default. In the case of Helgesen v. Inyangumia, 636 P.2d 1079 (Utah 1981), the court reversed the district court's denial to set aside a Default Judgment stating:

> The decision to relieve a party from a final judgment under Rule 60(b)(1) is subject to discretion of the trial court. But discretion should be exercised in furtherance of justice and **should incline towards granting relief in a doubtful case** to the end that the party may have a hearing. We reiterated in Mayhew v. Standard Gilsonite Co., 376 P.2d 951 (Utah 1962) that **it is quite uniformly regarded as an abuse of discretion to refuse to vacate a Default Judgment** where there is reasonable justification or excuse for the Defendant's failure to appear, and timely application is made to set it aside. 336 P.2d 1081 (emphasis added).

The alleged industrial accident incurred on or about October 1, 1991, Petitioner's work in the Pocatello, Idaho, area was nearly completed when the accident occurred. On or about October 22, 1992, the Applicant after returning to Salt Lake City after completion of the job in

Pocatello, filed for workers compensation benefits with the Industrial Commission. During the remaining time of 1991, Petitioner had little or no work in which to provide its employees. Shortly before Christmas, Applicant returned to his home in Las Cruces, New Mexico, where for the first time subsequent to the initial health care treatment provided at the Bannock Regional Medical Center in Pocatello, Idaho, Applicant sought the medical assistance of Dr. Alan Davis. (See Affidavit of Petitioner's President, Ron Bingham, at page 2.)

Shortly after the first consultation with the Applicant, Dr. Davis allowed for and certified Applicant able to return to work. However, in the first part of 1992 the work of Petitioner was sporadic. In January 1992, once Petitioner had procurred work for its employees, Applicant communicated to Petitioner that he was withdrawing his Application for workers compensation benefits and wished to drop the entire matter. (See Affidavit of Bingham at page 2.) However, the record created by the Industrial Commission at its October 10, 1992, hearing, wherein Petitioner was not present nor represented, assumes that Applicant returned home immediately after the accident to receive continued treatment from Dr. Alan C. Davis. In reality, Dr. Davis had very few consultation periods with the Applicant and failed to even provide a impairment rating based on the alleged injury of Applicant.

Petitioner, during the first part of 1992, was involved in other pending administrative action before the Industrial Commission. However, because of the communications from Applicant to Petitioner and the reliance of Petitioner on such communications, no appearance of counsel was entered nor was any responsive pleading filed with the Industrial Commission. Having received no additional notification of any pending action, Petitioner assumed that the communication received by Applicant was accurate and correct. Such understanding was

substantiated by Petitioner's receipt of a Notice of Cancellation of a Hearing dated April 2, 1992. Shortly before that Notice was received unbeknownst to Petitioner, its Deault was entered on or about March 20, 1992, for having failed to respond to the Application of the Applicant within the time required under the rules of the Industrial Commission.

It is patently unfair and prejudicial to Petitioner to not have the opportunity to fully respond to the allegations set forth in Applicant's Application and to have a full and complete hearing on the merits of such Application. Because of misrepresentation by Applicant to Petitioner and the receipt, coincidentally, of a Notice of a Cancelled Hearing received by Petitioner, Petitioner's failure to timely respond constitutes mistake, inadvertence, and/or excusable neglect. Equity demands that Petitioner be entitled to respond fully to the Applicant's Application and to have the Default Judgment entered against Petitioner set aside. Further, Petitioner is entitled to a hearing on the merits.

POINT II

THE EVIDENCE RELIED UPON BY THE INDUSTRIAL COMMISSION IN ARRIVING AT ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW WAS HEARSAY AND NOT SUPPORTED BY THE RECORD.

Because Petitioner was unaware of any hearing and any pending administrative action, a Default Judgment was entered against Petitioner. Petitioner was not present at the October 10, 1992, hearing wherein evidence was gathered and Findings of Fact and Conclusions of Law were entered by the Administrative Law Judge. The majority of the evidence taken and, as reflected in the transcript, was done so via telephone without the Applicant having been sworn to the testimony that was provided (Tr. 9 L. 14).

Further, Applicant did not submit any records to substantiate the claims of weekly work averages in excess of 55 hours. To the contrary, the records of Petitioner support a much lower weekly average, or approximately 23-30 hours per week.

CONCLUSION

Based on the foregoing, Petitioner is entitled to the equitable relief it seeks, namely a setting aside of the Default Judgment and an opportunity to be heard at a hearing. Further, the Findings of the Industrial Commission are erroneous and against the clear weight of the evidence presented. Therefore, Petitioner is entitled to have the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge set aside or modified.

Respectfully submitted this 22nd day of January, 1994.

James J. Lund

JAMES J. LUND,
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I caused to be mailed or hand delivered, ~~four~~ two true and correct copies of the foregoing Brief of Petitioner to the attorneys and parties at the addresses listed below, on the 22nd day of January, 1994.

SALVADOR D. MONTOYA
4362 Highway 28 South
Las Cruces, NM 84065

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INDUSTRIAL COMMISSION OF UTAH
160 East 300 South
Salt Lake City, UT 84111

James J. Lund

JAMES J. LUND,
Attorney for Petitioner

ADDENDA

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2304 S. Berkeley Street
Salt Lake City, UT 84109
Telephone: (801) 466-2210
ATTORNEY FOR PETITIONER

IN THE UTAH COURT OF APPEALS

PIPE SPECIALTY, INC., a Utah Corporation,	:	
Petitioner,	:	**AFFIDAVIT of RON BINGHAM, President of Petitioner, Pipe Specialty, Inc.**
-vs.-	:	
INDUSTRIAL COMMISSION OF THE STATE OF UTAH and SALVADOR MONTOYA,	:	Case No. 930353-CA
Respondents	:	

County of Salt Lake :

State of Utah :

The Affiant sayeth:

1. I am President of Pipe Specialty, Inc., a Utah corporation, and have been since its inception.

2. I am familiar with the day-to-day operations concerning Pipe Specialty.

3. On or about October 1, 1991, I was directing a crew of workers in and around the Pocatello, Idaho, area.

4. During that time, it is alleged that the Applicant, Salvador D. Montoya, injured his large left toe while working.

5. Applicant was directed to receive treatment at the Bannock Regional Medical Center in Pocatello, Idaho. At that point, we were nearly finished with the job there in Idaho.

6. Our crews returned to Salt Lake City towards the middle of October 1991, and we had little if no work the remaining portion of 1991. In 1992, our work was sporadic, but in a greater volume than the last part of 1991. I was aware that Applicant had filed an Application with the Industrial Commission seeking workers compensation benefits for the injury he sustained October 1, 1991.

7. On several occasions in the beginning part of the year 1992, Applicant indicated and communicated to me that he no longer wished to pursue the workers compensation claims with the Industrial Commission against Pipe Specialty.

8. Applicant continued to work on the crews that we had in the state of Utah and including the state of New Mexico.

9. The number of hours worked by Applicant in 1991 did not average 55 hours per week. There may have been a few weeks in which such number of hours were worked; however, the average was approximately 25-30 at most.

10. In addition to Applicant communicating to me that he no longer wished to pursue his claims for workers compensation benefits, our office was in receipt of a Notice of a Cancelled Hearing which further led me to believe that there was no pending administrative action at the Industrial Commission.

11. Because of the foregoing, I did not communicate any information concerning any pending action to legal counsel who was and currently is representing Pipe Specialty in various matters, including those before the Industrial Commission.

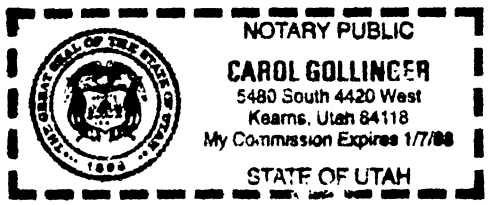
DATED this 21 day of February, 1994.

Affiant, Ron Bingham,
President of Pipe Specialty, Inc.

JURAT

Ron Bingham appeared before me on the _____ day of February, 1994, and I swear to me that to the best of his knowledge, information and belief, the foregoing is true and accurate.

DATED THIS 21 day of February, 1994.



Carol Gollinger
Notary Public

Residing at: _____

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 91-1181

SALVADOR D. MONTOYA, Applicant, vs. PIPE SPECIALTIES, INC. (uninsured). Defendant.	*	FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER Judge Donald L. George

This matter came on for hearing before the Honorable Donald L. George, one of the Administrative Law Judges of the Industrial Commission of Utah on October 15, 1992 on the application of Salvador Montoya for an award of temporary total compensation and payment of medical expenses incurred as the result of an industrial accident. The applicant was present by telephone from his home in New Mexico. The default of the defendant, Pipe Specialties, Inc., was issued on March 20, 1992 for failure to respond to the application within the time required by the rules of the Industrial Commission of Utah. The Uninsured Employers' Fund appeared through its counsel, Thomas C. Sturdy. The applicant testified on his behalf and the medical records pertinent to Mr. Montoya's injuries were admitted in evidence. Based upon that testimony and evidence, the Industrial Commission of Utah now makes the following:

FINDINGS OF FACT

On October 1, 1991, while pursuing the business of his employer, defendant Pipe Specialties, Inc., a Utah corporation, the applicant suffered an industrial accident when a jig holding a large section of pipe broke and dropped the pipe on Mr. Montoya's foot, fracturing the proximal phalanx of the left great toe. The accident occurred near Pocatello, Idaho. Mr. Montoya had worked for Pipe Specialties within the State of Utah within the previous six months.

The Bannock Memorial Medical Center, Pocatello, Idaho, and Alan C. Davis, M.D., Las Cruces, New Mexico, treated Mr. Montoya's injury. The medical bills are: $432.25 owing to the Bannock Regional Medical Center and $503.00 owing to Dr. Davis.

At the time of the accident, Mr. Montoya was working an average of 55 hours per week and earning $11.00 per hour. He was married and had one child who was dependent on him for support.

Mr. Montoya was totally disabled from the day of the acci-

dent until Dr. Davis released him to return to work on January 3, 1992.

Pipe Specialties, Inc. had no worker's compensation insurance at the time of Mr. Montoya's accident.

CONCLUSIONS OF LAW

The applicant sustained a compensable industrial accident on October 1, 1992, while employed by defendant Pipe Specialties, Inc., when a large section of pipe dropped on his foot and fractured the proximal phalanx of the left great toe.

The defendant is liable for Applicant's medical expenses reasonably related to the industrial injury.

The applicant is entitled to temporary total disability compensation benefits for the period from October 2, 1991 to January 3, 1992 when he was released to return to work by his treating physician.

ORDER

IT IS HEREBY ORDERED that Pipe Specialties, Inc. shall pay all medical expenses incurred by the applicant as the result of the industrial accident including, but not limited to, $432.25 owing to the Bannock Regional Medical Center, and $503.00 owing to Dr. Alan C. Davis.

IT IS FURTHER ORDERED that defendant Pipe Specialties, Inc., pay to Salvador Montoya temporary total compensation at the rate of $378.00 per week for 13.4286 weeks for a total of $5,706.01 for temporary total disability from October 2, 1991 through January 3, 1992. These benefits are accrued and shall be paid in a lump sum with interest of 8% per annum commencing January 3, 1992.

IT IS FURTHER ORDERED that the applicant shall be entitled to recover all attorneys fees and costs incurred in collecting this award from Pipe Specialties, Inc., pursuant to UCA §35-1-59.

IT IS FURTHER ORDERED that if Pipe Specialties, Inc., becomes or is insolvent, appoints or has appointed a receiver, or otherwise does not have sufficient funds, insurance, sureties, or other security to pay the amounts required to be paid by this Order, the compensation and benefits shall be paid by the Uninsured Employers' Fund in accordance with the Medical and Surgical Fee Schedule of the Commission. In the event of payment by the Uninsured Employers' Fund, it shall be subrogated to all of the rights of the applicant to collect the sums due and owing by Pipe Specialties, Inc., pursuant to UCA §35-1-107.

IT IS FURTHER ORDERED that any Motion for Review of the foregoing shall be filed in writing within thirty (30) days of

the date hereof, specifying in detail the particular errors and objections, and, unless so filed, this Order shall be final and not subject to review or appeal.

INDUSTRIAL COMMISSION OF UTAH

Donald L. George
Administrative Law Judge

Certified by the Industrial Commission of Utah, Salt Lake City, Utah, this

19th day of October, 1992.

ATTEST:

Patricia O. Ashby
Commission Secretary

Nov. 19 '92

THE INDUSTRIAL COMMISSION OF UTAH
Case Number 91001181

Salvador D. Montoya,	*	
	*	
Applicant,	*	
vs.	*	ORDER DENYING
	*	MOTION FOR
Pipe Specialties, Inc.	*	REVIEW
(uninsured),	*	
	*	
Respondent.	*	

****

The Industrial Commission of Utah ("commission") issues this order pursuant to Utah Code Annotated, Section 35-1-78 and Section 63-46b-12.

On November 19, 1992, Pipe Specialties, Inc. ("respondent") timely filed a motion for review of the Findings of Fact Conclusions of Law and Order entered by an administrative law judge ("ALJ") of the commission in the above captioned matter on October 19, 1992.

The respondent requests that the commission grant a hearing and review the merits of the applicant's claim. The respondent's request is based upon its claim that it received no notice of the pending action following the Notice of Cancellation of Hearing dated April 2, 1992.

Review of the record in this matter shows that the respondent received notice of the following: (1) Application for Hearing by certified letter dated January 30, 1992; (2) Notice of Hearing dated March 19, 1992; (3) Default Order for failure of respondents to file an answer to the application for hearing dated March 20, 1992; (4) Interrogatories to Applicant dated March 31, 1992; (5) Notice of Cancellation of Hearing dated April 2, 1992; (6) Notice of Hearing on October 16, 1992 dated July 20, 1992; (7) Findings of Fact Conclusions of Law and Order dated October 19, 1992; (8) Abstract of Award dated October 19, 1992; (9) Supplemental Order Awarding Attorneys Fees dated November 4, 1992; and (10) Abstract of Award dated November 4, 1992.

The file contains no notice that Mr. Lund was representing the respondent in this matter. All notices described above were mailed to the respondent at its address in Riverton, Utah and none were returned. It is unreasonable for the respondent to assert that notice should have been sent to his attorney when no notice of representation had been filed with the commission. We believe that the respondent had ample notice and opportunity to appear or file pleadings in this matter.

The respondent further claims that the applicant made representations that he no longer wished to pursue his claim

against the respondent and that the applicant's re ase tion caused the respondent not to file an answer to the app cat a for a hearing. It appears, then that the respondent is temp ng to articulate an estoppel argument in support of gr ntinc a new hearing.

A party claiming an estoppel cannot rely on representations or acts if they are contrary to his own knowledge of the truth or if he had the means by which with reasonable diligence he could ascertain the true situation. Coombs v. Ouzounian, 24 Utah 2d 39, 465 P.2d 356 (1970); see also Cook v. Cook, 110 Utah 406, 174 P.2d 434 (1946). Furthermore, a determination of the issue of estoppel is not dependent on the subjective state of mind of the person claiming he was misled, but rather is to be based on an objective test, i.e., what would a reasonable person conclude under the circumstances. Big Butte Ranch, Inc. v. Holm, Utah, 570 P.2d 690 (1977); Corporation Nine v. Taylor, 30 Utah 2d 47, 513 P.2d 417 (1973).

The Industrial Commission has no statutory authority to provide equitable remedies[1], however, even if we had such authority we would not find in favor of respondent under these circumstances. Applying a reasonable person standard, we find that a new hearing is not warranted in this case. The respondent received notice of all pleadings and hearings in this matter and chose to ignore them in deference to the alleged misrepresentations of the applicant. We believe that a reasonable person would make further inquiry with the commission or his attorney if he received notices regarding a matter he believed had been resolved. Therefore, the respondent's reliance on the alleged misrepresentations of the applicant was unreasonable.

ORDER:

IT IS ORDERED that the Order of the administrative law judge dated November 19, 1992 is hereby affirmed.

---

[1] "[T]he Industrial Commission remains a statutorily-created agency, not a court of equity. As such, the Industrial Commission has only those powers expressly or impliedly granted to it by the legislature." Bevans v. Industrial Commission, 790 P.2d 573, 576 (1990); Utah Copper Co. v. Industrial Comm'n, 57 Utah 118, 193 P. 24, 26 (1920).

IT IS FURTHER ORDERED that any appeal shall be to the Utah Court of Appeals within 30 days of the date of the Order, pursuant to Utah Code Annotated, Sections 35-1-82.53(2), 35-1-86, and 63-46b-16, and Bonded Bicycle Couriers v. Dept. of Employment Security, Case No. 920621-CA (Utah Ct. App. Dec. 4, 1992). The requesting party shall bear all costs to prepare a transcript of the hearing for appeals purposes.

Stephen M. Hadley
Chairman

Thomas R. Carlson
Commissioner

Colleen S. Colton
Commissioner

Certified this 6th day of January 1993.
ATTEST:

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I hereby certify that on the 19th day of January, 1993, the attached ORDER DENYING MOTION FOR REVIEW in the case of Salvador Montoya was mailed, postage pre-paid to the following persons at the following addresses:

Salvador Montoya
4362 Highway 28 So
Las Cruces, NM 84065

[redacted], Inc
4425 W 12600 S
Riverton UT 84065

Joyce Sewell, Administrator
UEF

Thomas C. Sturdy, Atty
UEF

Judge Donald L. George

INDUSTRIAL COMMISSION OF UTAH

June S. Harrison, Paralegal
Adjudication Division

/jsh
Cert\Montoya

James J. Lund 5751
Attorney for Defendant
10 West 100 South #710
Salt Lake City, Utah 84101
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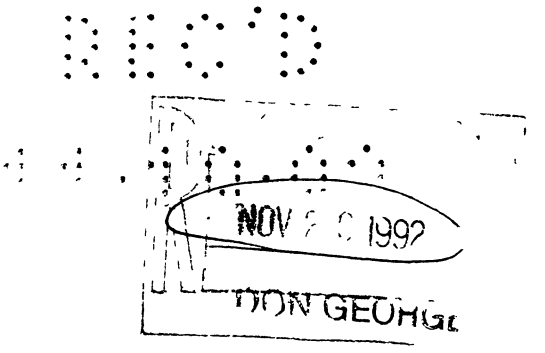


THE INDUSTRIAL COMMISSION OF UTAH

Salvador D. Montoya Applicant	:	MOTION FOR REVIEW
v.	:	
Pipe Specialties, Inc., Defendant	:	Judge Donald George

Defendant moves the Commission, pursuant to Commission Rules and Utah Code Ann. Section 35-1-82.52 (1988 Repl. Vol ____) to review its Findings of Fact, Conclusions of Law, and Order entered on the 19th day of October 1992. The basis for Defendant's motion for Review is as follows:

1. Applicant is currently and has been in the employ of Defendant subsequent to the alleged accident date.

2. While in the employ of Defendant, Applicant told Defendant he no longer wished to pursue a claim against Defendant.

3. Based on such representations, Defendant did not respond, to Claimant's Application, by filing on answer.

4. Further, Defendant received Notice of Cancellation of Hearing from the Commission dated April 2, 1992.

5. Thereafter, Defendant received no further notice from either the Commission or Applicant that any action was still pending against it.

6. Under such understanding Defendant did not apprise the undersigned of any action pending.

7. The undersigned has been active in representing Defendant in various legal matters including a separate matter before the Commission involving Mr. Lester Hunt as applicant.

8. As counsel for Defendant the undersigned has never received any notice concerning Applicant's application.

Based on the foregoing Defendant seeks a Hearing and Review on the merits of Applicant's Application and a reasonable and fair opportunity to consider the evidence put forth by Applicant in Support of the award entered by way at Order by the Commission on October 19, 1992.

DATED this 19th day of November, 1992

James J. Lund
Attorney for Defendant

Oct 19 '92

THE INDUSTRIAL COMMISSION OF UTAH

Case No. 91-1181

SALVADOR D. MONTOYA, Applicant, vs. PIPE SPECIALTIES, INC. (uninsured). Defendant.	*	ABSTRACT OF AWARD Judge Donald L. George

I hereby certify that on the 19th day of October, 1992, the Industrial Commission of Utah made and issued an award in the above entitled cause in favor of the applicant, Salvador D. Montoya, and against defendant Pipe Specialties, Inc., in the above entitled matter. The award was:

> The amount of $ $5,706.01, together with interest at the rate of 8% per annum from January 3, 1992, together with $935.25 for medical expenses, and all attorneys fees and costs incurred in collecting these sums from Pipe Specialties, Inc., purusant to UCA §35-1-59.

In witness whereof, I have hereunto set my hand and the seal of the Industrial Commission of Utah, this 9th day of October, 1992.

Donald L. George
Administrative Law Judge

Certified by the Industrial Commission of Utah, Salt Lake City, Utah, this 19th day of October, 1992.

ATTEST:

Patricia O. Ashby
Commission Secretary

CERTIFICATE OF MAILING

I certify that on the 19th day of [illegible], 1992, I mailed a true and correct copy of the foregoing findings of fact, conclusions of law and order by depositing the same in the United States mail, postage prepaid, addressed to:

Salvador D. Montoya
4362 Highway 28 South
Las Cruces, NM 84065

Pipe Specialties, Inc.
4425 West 12600 South
Riverton, UT 84065

Joyce A. Sewell, Administrator
Uninsured Employers' Fund
160 East 300 South, 3rd Floor
P.O. Box 146612
Salt Lake City, UT 84114-6612

Thomas C. Sturdy
160 East 300 South, 3rd Floor
P.O. Box 146612
Salt Lake City, UT 84114-6612

INDUSTRIAL COMMISSION OF UTAH

[illegible]
June Harrison, Paralegal
Adjudication Division

CERTIFICATE OF MAILING

I certify that on the 14th day of October, 1992, I mailed a true and correct copy of the foregoing findings of fact, conclusions of law and order by depositing the same in the United States mail, postage prepaid, addressed to:

Salvador D. Montoya
4362 Highway 28 South
Las Cruces, NM 84065

Pipe Specialties, Inc.
4425 West 12600 South
Riverton, UT 84065

Joyce A. Sewell, Administrator
Uninsured Employers' Fund
160 East 300 South, 3rd Floor
P.O. Box 146612
Salt Lake City, UT 84114-6612

Thomas C. Sturdy
160 East 300 South, 3rd Floor
P.O. Box 146612
Salt Lake City, UT 84114-6612

INDUSTRIAL COMMISSION OF UTAH

June Harrison, Paralegal
Adjudication Division

James J. Lund (#5751)
Attorney for Petitioners
Crandall Building, Suite 710
10 West 100 South
Salt Lake City, UT 84101
Telephone: (801) 575-8311

UTAH COURT OF APPEALS

PIPE SPECIALTY, INC.,	
Petitioner,	**PETITION FOR WRIT OF REVIEW**
vs.	
INDUSTRIAL COMMISSION OF THE STATE OF UTAH	Case No. 91-1181
Respondent	Court of Appeals No._____

Petitioner petitions the Utah Court of Appeals for a Writ of Review of the decision of the Adjudication Division of the Industrial Commission of the State of Utah, Case No. 91-1181 in the case entitled Salvador D. Montoya v. Pipe Specialty, Inc., which decision became final May 3, 1993. This petition seeks respondent to certify the entire record, which shall include all of the proceedings and evidence taken in this matter, to the court. This petition seeks review of the entire decision.

Dated this 6th day of June 1993.

James J. Lund
Attorney for Petitioner
Pipe Specialty, Inc.

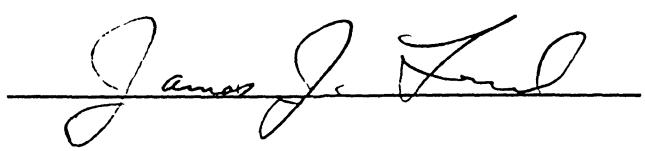
MAILING CERTIFIED

I hereby certify that I caused to be mailed, postage prepaid, a true and correct copy of the foregoing **PETITION FOR WRIT OF REVIEW** to the following on this 3rd day of June, 1993:

Mr. Benjamin Sims, General Counsel
Industrial Commission of Utah
Adjudication Division
140 East 300 South
P.O. Box 11600
Salt Lake City, Utah 84111

Utah Attorney General's Office
230 State Capitol Building
Salt Lake City, Utah 84114

Salvador D. Montoya
4362 Highway 28 South
Las Cruces, NM 84065



April 8th '93

COPY

JAMES J. LUND #5751
Suite 710 Crandall Building
10 West 100 South
Salt Lake City, Utah 84104
Telephone: (801) 575-8311
Facsimile: (801) 575-8340

Attorney for Defendant

BEFORE THE INDUSTRIAL COMMISSION OF UTAH
ADJUDICATION DIVISION

SALVADOR MONTOYA, an individual, Plaintiff v. PIPE SPECIALTY, INC., a Utah Corporation, Defendant.	MOTION FOR RECONSIDERATION Case No.

Defendant, Pipe Specialty, by and through its counsel, James J. Lund, hereby moves the Division to reconsider the Division's Order denying review previously sought by Defendant's Motion for Review. The basis for this Motion for Reconsideration is as follows:

1. By Defendant's previously filed Motion for Review on or about November 19 of 1992, the Division was apprised of the undersigned's representation of Defendant.

2. The Division, through denying Defendant's Motion for Review, failed to give notice to the undersigned because i omitted the undersigned's name and address to the mailing or se ice certificate that accompanied the Division's Orc r ted January 6, 1993 denying the Defendant's Motion or Review.
3. In subsequent communication with General Counsel for the Industrial Commission, in March of 1993 the undersigned had confirmed to him the fact that improper or inadequate notice of the Division's Order denying the Defendant's Motion for Review had been given.
4. Because of the inadequate and/or improper and untimely notice Defendant's appeal rights from the Division's Order denying the Defendant's Motion for Review were obviated.
5. The appeal time frame began running from the date of the Division's Order or January 6, 1993.
6. Defendant and its officers, being out of town on work was not apprised of the Division's Order denying Defendant's Motion for Review and therefore could not timely notify the undersigned of any action by the Division.

On the basis of the foregoing, Defendant, by and through the counsel of record, James J. Lund, hereby respectfully submits this Motion for Reconsideration.

DATED this 8th day of April, 1993.

James J. Lund
Attorney for Defendant